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Nos. 87-2050, 88-90 and 88-96

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1987

COUNTY OF ALLEGHENY, *et al.*,

*Petitioners,*

*v.*

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals For The Third Circuit

## BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

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## BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

### INTEREST OF THE AMICI

The American Jewish Congress ("AJCongress") is a membership organization of American Jews dedicated to the protection of the civil, political, economic and religious rights of Jews and all Americans. A specific concern of AJCongress is the protection of the religious freedoms guaranteed by the First Amendment. Founded in 1918, AJCongress has participated in most of the church-state separation cases decided by this Court over the last forty years. AJCongress' members, together with most American Jews, regard separation of church and state as essential if they are to enjoy full and equal membership in American society. *See generally* G.A. Tobin & S.L. Sassler, *Jewish Perceptions of Anti-Semitism* (1988).

The National Jewish Community Relations Advisory Council ("NJCRAC") is the umbrella planning and coordinating body for the field of Jewish community relations in the United States. It is composed of 113 community member agencies representing all major Jewish communities in the United States and the following national agencies: B'nai B'rith, American Jewish Congress, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, United Synagogues of America, National Women's League for Conservative Judaism, and Women's American ORT. The community member agencies are listed in the Appendix. The Jewish community, through the actions of NJCRAC's member agencies, has long sought to insure the protections afforded by the First Amendment to the Bill of Rights, particularly the separation of church and state. NJCRAC's commitment to the separation principle serves to help maintain the rights of individuals and groups, minorities and majorities, as political equals in this society.

AJCongress and NJCRAC submit this amicus brief because they believe that the display of major symbols of the Jewish and Christian religions at buildings that symbolize government brings together church and state in an unconstitutional manner. Because the displays at issue here occur during the December holiday season, this case requires the Court to revisit its decision in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984). AJCongress and NJCRAC urged a different result in that case; and they continue to believe that *Lynch* represents an incorrect application of the Establishment Clause. However, even if this Court continues to adhere to *Lynch*, the decision in this case should nonetheless be affirmed because the displays of the Creche and Menorah at seats of government are substantially different from the seasonal display in *Lynch*. Accordingly, AJCongress and NJCRAC respectfully submit this amicus brief to urge affirmance of the decision of the United States Court of Appeals for the Third Circuit.



## SUMMARY OF ARGUMENT

Symbols can be more powerful than words in conveying ideas. The First Amendment's protection for religious freedom is symbolized by a "wall of separation between church and state."[1] The phrase "you can't fight City Hall" has meaning because City Hall is a symbol of government and the power of the state. Religions use symbols to make comprehensible beliefs and concepts that are frequently inexplicable. Thus, the Nativity Creche symbolizes to people of all creeds the Christian belief that Jesus is the incarnation of God in human form. Similarly, the Menorah is a symbol of the Jewish belief in the miracles associated with the Maccabees' recapture of the Temple in Jerusalem.

In the case before the Court, the Third Circuit ruled that the preservation of the wall between church and state precluded the unadorned display of the Nativity Creche and the Menorah in City Hall. Agreeing with earlier decisions of the Sixth and Seventh Circuits, the Third Circuit properly rejected the argument that this Court's decision in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), permits any and all government displays of religious symbols in December. Instead, reflecting the teachings of scientists and theologians on the meaning of symbols, the lower court looked to five contextual factors in addition to the holiday season to determine the constitutionality of the public displays of the Creche and Menorah in Pittsburgh, Pennsylvania.

The factors considered by the court of appeals provide a framework for determining whether a particular government display of a religious symbol, when considered in its full context, has the direct and immediate effect of advancing religion in violation of the Establishment Clause. This Court should endorse that analysis and affirm the judgment below.

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1. *See Reynolds* v. *United States*, 98 U.S. 145, 164 (1879), *quoting* Reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (January 1, 1802).

## ARGUMENT

Seasonal displays of religious symbols continue to generate litigation and bitter controversy. Far from quieting disputes over such displays, this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984), has fueled them. In the five years since *Lynch* was decided, challenges to seasonal religious displays have become increasingly common.[2]

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2. There have been more than 20 such cases, apart from the one currently before the Court. The following cases involve the display of the Creche: *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987); *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986); *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, , 471 U.S. 83 (1985); *Doe v. City of Warren*, C/A 87-30084 (E.D. Mich. 1988); *Grutzmacher v. Public Building Comm'n*, 87-C-10746, 1988 U.S. Dist. Lexis 13853 (N.D. Ill. 1988); *Mather v. Village of Mundelein*, 87-C-10671, 1988 U.S. Dist. Lexis 12918 (N.D. Ill. 1988); *Smith v. Lindstrom*, C/A 87-0068C, 1988 U.S. Dist. Lexis 12547 (W.D.Va. 1988); *Burelle v. City of Nashua*, 599 F. Supp. 792 (D.N.H. 1984); and *Conrad v. City and County of Denver*, 724 P.2d 1309 (Col. 1986). The following cases involve the display of lighted Crosses during Christmas: *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986); *ACLU v. Mississippi State General Services Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987); and *Libin v. Town of Greenwich*, 625 F. Supp. 393 (D. Conn. 1985). The following cases involve the display of a Menorah: *Lubavitch of Iowa, Inc. v. Walters*, 808 F.2d 656 (8th Cir. 1986), *after remand*, 684 F. Supp. 610 (S.D. Iowa 1987), *app. pending* (8th Cir. 1988); *Chabad Lubavitch of Manasota v. City of Sarasota*, C/A 87-1808 (M.D. Fla. 1987); *Kalamson v. City of Cincinnati*, C/A 1-87-1017 (S.D. Ohio 1987); *Bendich v. City of Seattle*, 84-2-18662-3 (King Co. Super. Ct. 1988); *Wisconsin C.L.U. v. Earl*, 84 Civ. 6853 (Dane County Cir. Ct. 1987), *app. pending*, (Wisc. Sup. Ct. 1988); *Okrand v. Wilkins*, C-57-7-925 (Sup. Ct. L.A. County 1986), *app. pending* (1988); and *Friends of Lubavitch v. Dobby*, C/A 31-04-OP (Sup. Ct. Orange County 1986).

Prior to *Lynch*, there are only four reported challenges to seasonal displays spread over a period of twenty-five years: *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 150 Cal. Rptr. 867, 587 P.2d 663 (1978); *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 526 F. Supp. 1310 (D. Col. 1981), and *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 481 F. Supp. 522 (D. Col. 1979), *app. dismissed*, 628 F.2d 1289 (10th Cir. 1980), *cert. denied*, 452 U.S. 963 (1981); *Baer v. Kolmorgen*, 14 Misc. 2d 1015, 181 N.Y.S.2d 230 (Sup. Ct. Westchester County 1958); and *Laurence v. Buchmueller*, 40 Misc. 2d 300, 243 N.Y.S.2d 87 (Sup Ct. 1963).



While *Lynch* might have been expected (and was perhaps intended) to quiet such controversies, the continued litigation is explicable only by, and indeed itself evidences, the heightened social and religious significance of seasonal religious displays.[3] Much, but not all, of the Jewish community regards *Lynch* as a slap in the face since the Creche, like the Crucifix, symbolizes the fundamental ideas which separate Judaism and Christianity. *See, e.g.*, Redlich, *Nativity Ruling Insults Jews*, N.Y. Times (March 26, 1984); Mann, *Religious Symbols In Public Places*, 52 Cong. Monthly (No. 3) 3 (1985). Simultaneously, however, the decision has provoked a bitter dispute within the Jewish community about the desirability of erecting a Chanukah Menorah in tandem with official Christmas displays.[4]

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The post-*Lynch* proliferation of cases is particularly remarkable in light of the suggestion in *Lynch* that such cases trivialized the Establishment Clause. *See* 465 U.S. at 687.

3. By contrast, there is rarely litigation over the notational government "acknowledgement[s] of our religious heritage" identified in *Lynch*, 465 U.S. at 675-77. The attenuated religious significance of those acknowledgments makes them constitutionally tolerable. Most have never been challenged and those that have been were typically attacked only once by an individual. *See Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) (In God We Trust); *Zuerling v. Reagan*, 576 F. Supp. 1373 (C.D. Cal. 1983) (Year of the Bible); *O'Hair v. Blumenthal*, 462 F. Supp. 19 (W.D. Tex. 1978), *aff'd*, 588 F.2d 1144 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979) (In God We Trust). Organizations committed to separating church and state do not commit energy and resources, let alone credibility, to such efforts, as they have to challenging official Creches, Menorahs and other religious symbols.

4. *Compare* Stern, *The Year of the Menorah* (AJCongress 1987) *with Let There Be Light: Thirty Days In the Lives of Chabad Lubavitch Lamplighters* (1986) [hereinafter *Let There Be Light*]. Parts of the latter are reproduced in Joint Exhibit Volume at 17.

Hereafter references to the Joint Exhibit Volume are cited as "JEV" and to the Joint Appendix as "JA." The Brief of the County of Allegheny is referred to as "County Brief," the Brief of the City of Pittsburgh as "City Brief," that of Chabad as "Chabad Brief," and that of the United States as "U.S. Brief." The opinions of the district court and court of appeals below are reproduced in the appendices to the petitions for certiorari; references to those opinions will be to their reproduction in the Appendix to the Petition in No. 88-90, hereafter cited as "Pet. App."

The display of the Menorah at Pittsburgh's City-County Building raises this internecine dispute to one of constitutional dimension. At the same time the display at the Allegheny County Courthouse again brings before the Court the propriety of the seasonal display of the nativity scene; this time, however, the Creche is on the premises of the symbol of government. These displays of the Creche and the Menorah at the seat of government, albeit "in the context of the holiday season," are different in kind and degree from *Lynch*'s seasonal display celebrating an increasingly secular Christmas. Accordingly, the lower court's finding of a violation of the Establishment Clause should be affirmed.

## I. THE CONSTITUTIONALITY OF DISPLAYS OF RELIGIOUS SYMBOLS AT BUILDINGS THAT SYMBOLIZE GOVERNMENT SHOULD BE CONSIDERED IN THE CONTEXT OF THE SIGNIFICANCE OF SYMBOLISM IN THEOLOGY AND POLITICS.

Symbols communicate. *Spence v. Washington*, 418 U.S. 405, 410 (1974).

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones.

*West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

Symbols communicate more comprehensively, encompassing far more levels of meanings, than the printed or spoken



word.[5] At the same time, they communicate in ways far less intellectually precise, far less controlled, far less contained, than words in a book or on a disclaimer sign. Moreover, symbols are apprehended differently from the printed word, being perceived as a whole at once.[6]

A symbol has no objective, fixed meaning, set for all times, all places and all persons. "What we see . . . depends on our interpretation . . . . [T]here is no innocent eye; seeing is an active process, not a passive one." 7 The Encyclopedia of Religion, *Ichnography: Approaches to Ichnography and Iconology* 5 (1987) (citing work of L. Wittgenstein). As Justice O'Connor recognized in *Lynch*, 465 U.S. at 690, a symbol may have different meanings for different people; believers will see a religious symbol one way, non-believers another, and persons searching for a faith that will carry them through the crisis of the moment will see the symbol in yet another way.

Perhaps the most powerful symbols are religious symbols for they enable man to reduce to human scale the inexplicable faith that constitutes religion.[7] Students of religious symbolism emphasize that symbols are an effective, perhaps indispensable, device for communicating complex religious ideas.[8]

---

5. F.N. Dillstone, *The Power of Symbols in Religion and Culture* 7-14 (1986) [hereafter Dillstone, *Power of Symbols*]; P. J. Tillich, *Theology and Symbolism*, Religious Symbolism 108-09 (1970) [hereafter Tillich, *Theology and Symbolism*].

6. "Visual forms are not discursive: they do not represent their message sequentially but simultaneously. While the meanings given through verbal language are understood successively, those given through visual forms are understood only by perceiving the whole at once." 7 The Encyclopedia of Religion, *Ichnography: Words and Images* 1-3a (1987). Susanne Langer, who argues for such a distinction in her *Philosophy in a New Key* 79-102 (1951), calls this kind of semantics "'presentational symbolism,' indicating that we grasp it not by reasoning but by feeling."

7. Dillstone, *Power of Symbols*, *supra* note 5, at 2-13, 99-147; C.C. Richardson, *The Foundations of Christian Symbolism*, Religious Symbolism 1 (1970); Tillich, *Theology and Symbolism*, *supra* note 5, at 107-16.

8. Religious symbols do not merely portray some historical event, but rather communicate to the believer the message that the depicted historical event involved some divine intervention: "The symbol reveals certain dimensions of reality that would otherwise elude our knowing." 14 The Encyclopedia

Because a symbol engages the onlooker's attention subtly and indirectly, it is effective in situations where words, especially words which are intended to proselytize, are not.[9] It is ideally suited for communicating religious ideas in a religiously diverse and increasingly secular society, in which open calls to convert are impolite and in which discussion with strangers of topics as sensitive as religion is scrupulously avoided.

The use of symbols is not confined to religion. The nation's political life is rich with symbols. The Statue of Liberty, the bald eagle, the presidential monuments, the flag, the black robes of the Justices of this Court, the uniforms of the Armed Forces, all have symbolic meanings. They are the physical symbols of the American civil religion. Bellah, *Civil Religion In America*, 96 Daedalus 1 (Winter 1967). Buildings like the National Capitol, a statehouse or city hall are not only functional but also symbolic of the openness of democratic government and its responsibility to all citizens.

As this Court recognized in *Spence*, 418 U.S. at 410, symbols take on meaning from the context in which they are displayed because that context is part of the "whole" symbol.[10] "People's responses to a symbol will be contingent upon their assessments of the circumstances of its usages." C. Elder & R. Cobb, *The Political Uses of Symbols* 57 (1983). A triptych depicting the Nativity of Christ has one meaning on the altar of

NOTES *(Continued)*

of Religion, *Symbolism* 206 (1987). For Paul Tillich, the noted theologian, "the object of theology is found in the symbols of religious experience. Theology, then, is the conceptual interpretation, explanation, and criticism of the symbols in which a special encounter between God and man has found expression." Tillich, *Theology and Symbolism*, *supra* note 5, at 108. Similarly, while Abraham Joshua Heschel explained that in Judaism symbols are not treated as surrogates for the divinity, he recognized that symbols are an important device for communicating religious ideas and values. *See* A. J. Heschel, *Symbolism and Jewish Faith*, Religious Symbolism 53 (1970).

9. *See* Dillstone, *Power of Symbols*, *supra* note 5, at 145 ("Initially, every human is immersed in the profane world, but symbolism effects a permanent solidarity between man and the sacred") (quoting Mircea Eliade).

10. Dillstone, *Power of Symbols*, *supra* note 5, at 36-41.



a church, a different one when hung on a museum wall, and still another meaning when displayed in the lobby of the county courthouse.

It is against these teachings about the significance of symbols that courts must decide cases such as this one. The court below properly applied this learning to determine that the melding of religious and civil symbols at issue here violated the Establishment Clause through a "temporal commingling of the sacred and civil." Van Alstyne, *What Is An "Establishment of Religion,"* 65 N.C.L. Rev. 910, 914 (1987).

## II. *LYNCH* DID NOT ESTABLISH A BROAD RULE PERMITTING ANY AND ALL GOVERNMENT DISPLAYS OF RELIGIOUS SYMBOLS IN DECEMBER.

Citing *Lynch*, petitioners argue that when the constitutionality of seasonal displays of religious symbols is considered, contextual factors other than the holiday season ought to be ignored. County Brief at 19-21; City Brief at 17; Chabad Brief at 9-14. They urge a black-letter rule permitting December displays, without regard to their location, content, or purpose. They argue that the Second Circuit was correct in holding that the only relevant context against which to measure December religious displays is the holiday season. *McCreary v. Stone*, 739 F.2d 716, 728-29 (2d Cir. 1984), *aff'd by an equally divided Court sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985).

However, as the Third, Sixth and Seventh Circuits have concluded,[11] *Lynch* established no such rule limiting the courts' analysis of religious displays to a single contextual factor, the Christmas holiday season. The problem of whether and what additional contextual factors should be considered arises from

11. In addition to the decision below, *see American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987); *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986); *see also Burelle v. City of Nashua*, 599 F. Supp. 792 (D.N.H. 1984).

the ambiguity of Chief Justice Burger's opinion in *Lynch*.[12] However, Justice O'Connor's concurrence, which she characterizes as not stating any major differences with Chief Justice Burger's opinion, 465 U.S. at 687, repeatedly indicates that religious symbols must be judged not only in the holiday context, but also on other relevant factors, including, in that case, the "particular physical setting" and the presence of surrounding secular symbols, such as reindeer, gifts, mistletoe and the like. *Id.* at 692. Thus, Justice O'Connor refused to confine the analysis to the holiday context to the exclusion of other factors.[13]

This approach is the appropriate frame of reference if the Establishment Clause is not to take a December vacation. To hold otherwise is to countenance *de jure* discrimination against faiths which celebrate no holidays in December[14] and whose symbols, if displayed at all, will be permitted only at the Christmas season when they are culturally and religiously irrelevant and hence of only secondary significance. If, for

12. Justice Berger seems to base his opinion on the fact that the *Lynch* Creche was part of a large seasonal display. *See* 465 U.S. at 671 (description of Creche as part of larger display); *id.* at 682 (discussion of "inclusion of the Creche" in the Christmas display); *id.* at 686 ("if inclusion of [the Creche] . . . would so 'taint' the city's exhibit"). Yet, he also seems to base his opinion on the fact that the Creche was displayed during the Christmas holiday season. *See id.* at 679 ("In this case, the focus of our inquiry must be on the Creche in the context of the Christmas season"); *id.* at 680 ("When viewed in the proper context of the Christmas Holiday season . . .").

13. Justice O'Connor's opinion is replete with indications that a determination of the constitutionality of a display of a religious symbol must take into consideration the display's unique characteristics. *See, e.g.*, 465 U.S. at 694 ("every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement of religion"); *id.* ("I cannot say that the particular creche at issue in this case . . ."). Moreover, the opinion emphasizes that such a determination must consider a host of factors in addition to the holiday season. *See, e.g.*, *id.* at 691 (discussing the "evident purpose of including the creche in the larger display . . ."); *id.* at 692 ("the creche . . . is very commonly displayed along with secular symbols, as it was in Pawtucket"); *id.* ("These features combine to make the government's display of the creche in this particular physical setting . . . .").

14. *Cf. Larson v. Valente*, 456 U.S. 228 (1982).



example, a Buddhist display is included in a Christmas exhibit, when there is no relevant Buddhist holiday being celebrated, the inevitable message is that "Christmas is the 'official' holiday" and that other religions are stepchildren.

The decision in *Doe v. City of Warren*, C/A 87-30084 (E.D. Mich. Oct. 20, 1988), cited by the County (County Brief at 17), which emphasizes the holiday season to the exclusion of all else, illustrates the point perfectly. Although plaintiffs there challenged both a Creche and a Menorah, the court dealt only with the Creche, nowhere discussing the legality of the Menorah, which was simply swept along by the Christmas display.

Similarly, the dissenting judge below, who, in evaluating the constitutionality of the Creche, would read *Lynch* as considering only the seasonal context,[15] was himself forced to rely on other contextual factors to permit the display of the Chanukah Menorah, since the religious and cultural integrity of that symbol could not be maintained if its display were justified by reference to a holiday of an antithetical religious tradition. 842 F.2d at 670-71 (Pet. App. at 32a).

In short, unlike the approach of petitioners, who would permit any and all religious displays in December, the broad contextual analysis adopted by the court below (as well as by the Sixth and Seventh Circuits)[16] is consistent with *Lynch* and is faithful to the most basic precept of the Establishment Clause — that of equality between faiths. *Larson v. Valente*, 456 U.S. 228, 244 (1982). In so doing it implicitly acknowledges the teachings of semiotics by which government displays of symbols must be judged.

15. The Christmas season can mean a period beginning only days before Christmas, right after Thanksgiving, or with the first Sunday in Advent, and continuing at least until after New Year's Day, and perhaps until Candlemas, on February 2, the end of the church's Christmas cycle. 4 New Catholic Encyclopedia, *Christmas and Its Cycle* 655 (1967). Chanukah sometimes, but not always (as this year), overlaps Christmas.

16. See cases cited in note 11, *supra*.

## III. THE THIRD CIRCUIT'S ANALYSIS, WHICH FOCUSES ON A BROAD RANGE OF CONTEXTUAL FACTORS, AIDS A COURT IN DISCERNING THE CONSTITUTIONALITY OF GOVERNMENT DISPLAYS OF RELIGIOUS SYMBOLS.

No general rule can determine in advance whether the religious import of a particular symbol is overshadowed by the surrounding secular context, or whether the reverse is true. As in other church-state contexts, only case-by-case adjudication permits a court to locate the line between permissible and impermissible government involvement with religion. *Cf. Bowen v. Kendrick*, 108 S. Ct. 2562 (1988).

The courts which have read *Lynch* as considering contextual factors beyond the holiday season have looked to a broad range of factors. The inquiry is summarized in the Third Circuit's enumeration, 842 F.2d at 662 (Pet. App. at 13a-14a):

> The variables that a court should consider . . . include: (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display.

These factors, which were intended as an explication of the effects branch of the three-part test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), accurately capture the teachings of social scientists and theologians on the perception and meaning of symbols. The listing provides a useful framework for determining whether a particular symbol has the direct and immediate effect of advancing religion[17] or, to use Justice

17. *See Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 783 n.39 (1973); *cf. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S. Ct. 2862, 2868 (1987), quoting *Lemon v. Kurtzman*, *supra*, 403 U.S. at 612 ("a principal or primary effect").



O'Connor's reformulation, whether a particular display in fact "conveys a message of endorsement or disapproval" of religion.[18]

The criteria identified by the Third Circuit are sufficiently inclusive and balanced to allow for fair and comprehensive evaluation of the public significance of the particular religious symbols. The lower court's analysis is not an end-run around *Lynch*, as petitioners charge (County Brief at 10-13; City Brief at 8-11; Chabad Brief at 8), but rather a framework for case-by-case adjudication of the propriety of religious displays by government. As the following application of the Third Circuit's analysis to the displays at issue here illustrates, the court below was on solid ground in conducting its inquiry.

### 1. The Location of the Creche and Menorah at the Seat of Government Conveys Governmental Approval of the Religions Whose Symbols Are Displayed.

Religious symbols displayed at the seat of government manifest a joining of civil and religious meanings. The Creche and the Menorah (referring in particular to the human incarnation of the Son of God sent to earth to redeem mankind in the case of the Creche (JA 72-73; 84) and the divine miracle associated with the cleansing of the Temple after the Maccabeean victory over the Syrian Greeks in the case of the Menorah (JA 262-64)) convey the theologically crucial messages that God intervenes in history and that God is concerned with those who trust in Him. The civic symbol, the seat of government, epitomizes democratic rule. The blending of one with the others embodies the constitutionally suspect suggestion that religion in general, and the Jewish and Christian religions in particular, are relevant to the exercise of civil power. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *cf. Burton v. Wilmington Area Parking*

18. *Lynch*, 465 U.S. at 690; *see also Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 389 (1985).

*Authority*, 365 U.S. 715 (1961) (racially discriminatory restaurant on local public premises suggests unconstitutional state approval of discrimination).

However, the location of these displays is improper for yet another reason. By giving a preferred place to symbols of one or two faiths, the government unambiguously, if unintentionally, announces that those faiths enjoy a preferred status in society. To be sure, the United States is not an exclusively "Christian nation"[19] in either a demographic or a legal sense. The Establishment Clause, however, does not exhaust itself in preventing an exclusive religious monopoly. *Wallace* v. *Jaffree*, 472 U.S. 38, 52 (1985).[20]

Even if the Menorah and Creche are taken as one (despite the fact that they adorn different buildings owned and operated by two distinct political entities, are not part of a single physically unified display and are not visible simultaneously), they represent only the Judeo-Christian tradition, not other faiths, agnosticism or atheism, which are all part of contemporary American life. It is surely not sufficient to argue, as Chabad does (Chabad Brief at 22), that a Judeo-Christian display is better than a purely Christian one and that the adverse impact on others of having only Judeo-Christian symbols displayed can be dismissed because no other group has made an issue of the unfairness. Government is affirmatively charged with not treating any religious position unfairly; that obligation is not conditional on a request for better treatment from an affected group. To be sure, neither the Creche nor the Menorah physically obstructs entrance to the Courthouse or City Hall;[21] but the display of selected religious symbols at the seat of government

19. *See Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 471 (1892).

20. *See* M. Silk, *Spiritual Politics: Religion and America Since W.W. II* (1988).

21. The United States repeatedly emphasizes the absence of coercion as a reason to uphold the constitutionality of these displays. (U.S. Brief at 21-22). This Court, however, long ago rejected coercion as an element of an Establishment Clause claim. *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 222-23, 224 n.9 (1963).



necessarily communicates that non Judeo-Christian belief systems do not share the same status in the eyes of government.[22]

The decision to locate the symbols at the seat of government is surely not happenstance. *See, e.g.*, JA 78 (Father Gregory Swiderski); JA 271 (Rabbi Israel Rosenfeld). Their sponsors consciously chose to have their religious symbols displayed at government office buildings, not at a church, synagogue, or business, where such symbols can be and are properly displayed without legal controversy.[23] The displays in this case, however, are not public in the sense of being prominent, but public in the sense of being official displays on government property. The distinction is crucial.

22. Moreover, while there is no evidence that the displays here were motivated by a governmental desire to obtain a political advantage, there is a risk that if all December displays are allowed, some governmental entities may seek to use religious symbols at their doorstep as a tangible indication that they enjoy the blessings of institutional religion and, by extension, God. The First Amendment denies government the right to such exploitation of religion. *Cf.* J. Madison, *Memorial and Remonstrance Against Religious Assessments* ¶5, reproduced as Appendix to *Everson* v. *Board of Educ.*, 330 U.S. 1, 83 (1947), which warned against "the Civil Magistrate . . . employ[ing] religion as an engine of civil policy." As Professor Van Alstyne has written, "it is an act of civil hubris for government to seek religious purchase on civil loyalty," by confusing "the consensual and the democratic with the divine." Van Alstyne, *What Is "An Establishment of Religion,"* 65 N.C.L. Rev. 910, 914 (1987). Unlike the December season analysis urged by petitioners, the multi-factored analysis adopted by the Third Circuit would allow consideration of such motivation.

23. Nothing in the Constitution confines religion to the home or to citizens' private lives. Any effort to exclude religion from the marketplace of ideas would be unconstitutional. *McDaniel* v. *Paty*, 435 U.S. 618 (1978); *Walz* v. *Tax Comm'n of New York*, 397 U.S. 664, 670 (1970); *Widmar* v. *Vincent*, 454 U.S. 263 (1981). Moreover, where a group has access to a public forum for purposes of a meeting, demonstration or worship service, it may properly display its religious symbols in conjunction with those activities. *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979). This case involves no such usage, but rather free-standing, semi-permanent, displays intended to benefit from an aura of government approval.

**2. The Absence of Surrounding Secular Symbols Highlights the Religious Message of the Creche and Menorah.**

The Court in *Lynch* reasoned that because the Pawtucket Creche was included in a larger secular holiday display consisting, *inter alia*, of candy-striped poles, clowns, elephants, teddy-bears, colored lights and other secular Christmas symbols, its presence served principally to recall the "religious origin of the Christmas celebration." 465 U.S. at 685. Thus, the *Lynch* Creche, in a commercial surrounding, did not convey an independent religious message.

Conversely, and by the same reasoning, the absence of parallel secular symbols, describing the holiday in secular terms, allows a religious symbol to speak with an unambiguously religious voice. When a religious symbol appears in isolation with no surrounding secular symbols to indicate that it is any less religious than an identical symbol displayed in similar fashion at a church, synagogue, mosque or temple, its religious message is undeniable and undiluted.

Although often lampooned,[24] the so called two-reindeer interpretation of *Lynch* is sensible and squarely rooted in Establishment Clause principles. The absence of surrounding secular[25] symbols in the Pennsylvania displays strengthens the inference which the Third Circuit drew and which the public surely is entitled, and likely, to draw: that this Creche and this Menorah convey religious messages.

Chabad argues (Chabad Brief at 26-27) that the Menorah is viewed together with the nearby Christmas tree as a single symbol, and that no one can mistake that hybrid symbol as a

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24. *American Jewish Congress v. City of Chicago, supra*, 827 F.2d at 131 (Easterbrook, J., dissenting), citing Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall — A Comment on Lynch v. Donnelly*, 1984 Duke L.J. 770, 785.

25. Poinsettias were planted near the Creche. However, the introduction of the poinsettias as a Christmas flower was premised on a religious tale of a poor Mexican boy who came to pay his respects to the Infant Jesus in a Creche. Having nothing to bring with him as a present, he plucked a flower (which turned red) and laid it in the Creche. J.W. Golby & A.W. Purdue, *The Making of the Modern Christmas* 104 (1986).



government endorsement of either religion. Although Chabad is correct that context matters, the juxtaposition of the Christmas tree and the Menorah is not sufficient to permit display of the Menorah. When a Creche is surrounded by secular symbols of the same holiday, the entire display suggests that this is a holiday with secular and religious elements. When symbols of divergent faiths, celebrating different ideas,[26] are displayed together, the informed viewer does not put them together in this fashion; rather, the mind naturally separates the two and assumes the government is celebrating each of the Judeo-Christian holidays which occur in December.[27]

**3. The Symbols' Religious Message is Confirmed by their Sponsors' Religious Motivation.**

The Third Circuit suggested that questions of ownership and public involvement are also relevant to the assessment of a symbol's impact. Here the Creche and Menorah are property of the County and City, having been "donated" by religious groups.[28] (JA 164, 290-91). At the same time, however, the City and County have only ministerial duties in erecting the challenged displays, a fact which to some small degree supports

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26. *See, e.g.*, Rabbi W. Jacob, *Contemporary American Reform Response* 260 (1987).

27. Chabad, moreover, is not interested in the general (Christian) viewer, but the Jewish viewer, and particularly the Jewish viewer who is susceptible of being "drawn back to his Jewish roots." For many American Jews, Americanization meant abandoning or suppressing Jewish roots, as a condition of Americanization. *See, e.g.*, M.E. Marty, *Pilgrims in Their Own Land: 500 Years of Religion in America* 283-94 (1984); S.E. Alstrom, *A Religious History of the American People* 970-84 (1972). The state's identification with Judaism, as represented by its sponsorship of the Menorah (regardless of the presence of the tree) overcomes this (perceived) dilemma, and thus substantially aids the likelihood of Chabad's efforts to encourage increased religious observance.

28. Indeed, in response to Chabad's motion for a recall of the mandate, the City asserted that the Menorah was not intervenor's display (as Chabad claimed), but its own. Answer to Motion of Chabad for Recall of Mandate ¶3, *ACLU v. County of Allegheny*, 842 F.2d 655 (3rd Cir. 1988).

petitioners' position. This mitigating factor, however, is outweighed by the public knowledge that those official displays are sponsored by religious groups. Unlike the *Lynch* Creche, whose business association sponsor intended to stimulate commercial activity, 465 U.S. at 671, the Creche and Menorah challenged here were erected by their sponsors with religious goals in view.

a. *The Creche*

The Courthouse Creche was donated by the Holy Name Society, an entity founded in the thirteenth century "to exhort the faithful to increased reverence for the name of the Redeemer, and . . . to make reparation for and to counteract the prevalent profanity and blasphemy," tasks it carries on to this day. New Catholic Encyclopedia, *Holy Name Society* 79 (1967). It promotes "public manifestation of respect for Christ's name . . . [by leading] . . . mammoth rallies, parades, and religious demonstrations of other kinds." *Id*. at 79b; *see also* JA 73-74.

The Society's display of the Creche at Christmas time effectively urges the viewer to "Keep Christ in Christmas"; to contemplate the message displayed on the banner over the Creche, "*Gloria In Excelsis Deo*"; to ignore the prevailing profanation of the Christmas holiday; and to deepen respect for Christ. These are quintessentially religious messages, sent by the "official" Allegheny County Creche. The official display suggests that Christmas is a societal celebration of the birth of the Christian Messiah rather than a private family religious celebration. Its presence at the seat of government thus serves to counter, in an unmistakable way, the contemporary trend towards the privatizing of Christmas. Cheal, The *Private and the Public: The Linkage Role of Religion Revisited*, 28 Rev. Rel. Research (No. 3) 209 (1987).

b. *The Menorah*

Chabad-Lubavitch[29] likewise erects Menorahs to transmit

29. Chabad-Lubavitch (hereafter Chabad) is one of numerous Hassidic Jewish groups. It bears the name of the town in Russia where it had its beginnings. *See* 7 Encyclopedia Judaica, *Habad* 1014 (1980). Unlike most contemporary Hassid groups, which are inwardly directed, Chabad is actively engaged in seeking out Jews whose religious commitment is weak, or takes non-traditional forms, in an effort to generate a commitment to a higher level of Jewish religious observance. *See generally* L. Harris, *Holy Days: The World of a Hassidic Family* 178 (1985).



religious messages. While originally the Menorah was lit only in or around the home, it has long been the custom to light a Menorah in the synagogue; the purpose of such celebrations outside the home is to "publicize the miracle" of Chanukah in a public place. *See* 7 Encyclopedia Judaica, *Hanukkah* 1128 (1980); JA 266-72 (testimony of Rabbi Israel Rosenfeld). This goal is achieved by lighting a Menorah at City Hall.

Since 1979, Chabad has instituted a nationwide campaign to erect Chanukah Menorahs on governmental land associated with relevant seats of government. (JA 264-66). Chabad believes that Chanukah Menorahs should be placed in public places, such as on the City-County Building, during the Chanukah celebration to spread to as may people as possible the message of God's miracle for the Jewish people that took place on Chanukah. (JA 236-37, 287-90).

The Lubavitcher Rebbe, spiritual leader of the Chabad movement [JA 249-50, 265], has acknowledged the importance of location to the success of this nationwide campaign:

> [W]here Chanukah Lamps were kindled publicly [t]he results have been most gratifying in terms of spreading the light of the Torah and Mitzvoth, and reaching out to Jews who *could not otherwise* have been reached . . . . It was precisely through kindling of the Chanukah Lamp in public places, during "ordinary" weekdays, with pride, that it was brought home to them that true Judaism is practiced daily, and that no Jew should feel abashed about it.[30]

(emphasis in original); *accord* the letter from the Lubavitcher Rebbe reproduced in *Chanukah: A Lesson in Religious Freedom*

30. Quoted in Stern, *The Year of the Menorah* 5, *supra* note 4. The Rabbi has also made clear that the purpose of a public Menorah is not to proselytize non-Jews, but to "bring Jews back to their Jewish roots." *Id*. at 8. Chabad's publication, *Let There Be Light*, *supra* note 4, describes the effort to place Menorahs in public places as intended to "spread the light of Torah and mitzvot (commandments) to each and every Jew. . . ." *Id*. at 4.

(JEV 44). This message of encouraging greater personal religious commitment was evident to the district court, which found that the Menorah symbolized the lighting of Jewish souls. (Pet. App. at 39a).[31]

Plainly, those persons and groups who erect religious displays at the seat of government believe that they are effective in furthering their religious missions. The district court's additional finding (Pet. App. at 39a) that the Creche and Menorah were constitutionally tolerable because they enabled the government to inform the public at large that each faith had a miracle to celebrate during the holiday season underscores the correctness of these beliefs.[32]

**4. The Challenged Symbols Are Intensely Religious.**

The intensity of a symbol's religious message is directly proportional to the extent to which it is reserved for religious purposes, and not used for conflicting ethnic, national or commercial purposes. Some religious principles are more intense, more central to a faith, than others. Both of these factors must play a role in a court's assessment of the impact of a particular symbol.

a. *The Creche*

The *Lynch* Court took for granted that the Creche was a religious symbol. 465 U.S. at 680, 685. That judgment was well

31. This was not an idiosyncratic view, a judicial rewriting of sacred history. For some scholars, the emphasis on personal spirituality, on the "spirit of God being with his people" is the historic meaning of the Menorah as a religious symbol. V.A. Klagsbold, *The Menorah As A Symbol: Meaning And Origin in Early Jewish Arts*, Jewish Art 126, 130 (1988).

32. As the court of appeals observed, this governmental platform (which, of course, was not available to non-Judeo-Christian faiths) was not an appropriate place from which to broadcast this message. 842 F.2d at 663 (Pet. App. at 15a). Whether a particular event was a miracle, to say nothing of whether miracles occur at all, 9 The Encyclopedia of Religion, *Miracles* 341 (1987), is a quintessential religious question, which the government may not ask, let alone answer. *See United States v. Ballard*, 322 U.S. 78 (1944). Nor may government facilitate efforts by religious groups to proselytize members of the public. *School Dist. of Abington Township v. Schempp*, *supra*, 374 U.S. at 314 (Stewart, dissenting).



founded. The Creche's origins as a public Christmas symbol are without doubt religious. Its use stems in Western Christendom from the Midnight Mass said on Christmas at the Church of Santa Maria Maggiore in Rome, at the shrine of Christ's Creche. The Roman liturgical use of the crib on Christmas night was borrowed from a similar rite of the Church at Jerusalem. In the Middle Ages, in a conscious effort to popularize the religious message of Christmas for those not intimately familiar with the seasonal liturgy, St. Francis of Assisi originated the devotion of the Christmas crib, a devotion which became, and has remained, widely popular.[33]

The motto "*Gloria In Excelsis Deo*," which appears over the Courthouse Creche, and which underscores the Creche's religious message, is also closely tied to the Christmas liturgy. Like the Creche, it was adopted by the Roman Church for use at Christmas in imitation of the Church at Jerusalem. According to *Luke* 2:14, this prayer was first said by the angels on Christmas eve."[34]

The Creche is not just a mildly or tangentially religious symbol, or one whose present religious significance is an artifact of earlier pagan practices. To the contrary, the Creche epitomizes the fundamental and primary tenant of the conventional Christian faith — that God was incarnate in flesh and blood.[35]

33. The Encyclopedia of Religion, *Christmas* 460(b) (1987); 3 New Catholic Encyclopedia, *Crib* 447 (1967); 4 New Catholic Encyclopedia, *Christmas and Its Cycle* 659 (1967); C.A. Miles, *Christmas in Ritual and Tradition-Christian and Pagan* 94-95, 113-118 (1912).

34. C.A. Miles, *Christmas in Ritual and Tradition-Christian and Pagan*, 91, 94, 105-118 (1912). The creche reached the United States by way of pietistic German Protestant immigrants, as well as Catholics. E.L. Tennant, *American Christmases* ch. v (1986); J. H. Barnett, *The American Christmas: A Study In National Culture* 11-13 (1954).

35. The Nativity Creche in this case represented the theological account of Jesus' birth. At the top of the Creche was an angel with a banner inscribed with the phrase from the Christian Gospel *Luke* 2:14 "*Gloria in Excelsis Deo*," meaning "Glory to God in the Highest." (JA 74-75; JEV 4). The infant Jesus lay on a white cloth, which is used as a symbol on the altar during the part of the Catholic Mass in which Christ becomes present in the Eucharist. (JA 76). Moreover, the Creche showed the infant Jesus being worshipped as God by

Thus, it represents one of the major differences between Christians and Jews and other non-Christians.

b. *The Menorah*

The Menorah is the central ritual article for the Jewish holiday of Chanukah. Utilized in the "Mitzvah," or divinely commanded act, of lighting an increasing number of candles on each night of the eight-day Jewish holiday, it is intended to, and does, convey the story of the miracle of God celebrated by Chanukah.

Chanukah, which comes from the Hebrew word for dedication, is the Jewish holiday that marks the rededication of the Jewish Holy Temple after the successful Hasmonean revolt against the Syrian Greeks. The Menorah recalls the miracle that oil sufficient to light the Temple Menorah for one day sufficed for eight. (JEV 44-45; JA 263-64).[36] As the Chanukah liturgy, recited when the Menorah at the City-County Building is lit (JA 271, 273), explains, "these candles which we are lighting [recall] the miracles and wonders, the salvation and the battles which [God] performed for our fathers in those days, at this time." Thus, the Menorah represents the miracle of God's intervention in history on behalf of His faithful celebrated at Chanukah. It is for constitutional purposes, therefore, a religious symbol, even though it may not be a "sacred" object under Jewish law.[37] The

NOTES *(Continued)*

kings and shepherds alike. (JEV 3). Thus, the Creche depicted in adorational terms the birth of a divinity in the form of an infant.

36. As has been the tradition for at least six or seven hundred years, the Menorah at issue here, although not identical with the Temple Menorah, is loosely styled after it. F. Landsberger, *Old Hanukkah Lamps in Beauty and Holiness: Studies In Jewish Customs and Ceremonial Art* 283-307 (1970); M. Narkiss, *Menorat Ha-Chanukah* (1939).

37. The 7-branched Menorah serves as a symbol of the State of Israel, *see generally* E. Tzurel, *Menorat Yisrael* (1988) (Hebrew) and in a broader sense, the Jewish people. In contexts where its use in connection with the State of Israel is apparent, the Menorah will be a secular symbol. But the 9-branched Menorah erected during Chanukah is not intended to symbolize the State of Israel or the Jewish people generally. Chabad's motivation suggests no such secular purpose. (JEV 17-23, 44-51).



Menorah is in this regard like a Creche which is intended to, and does, convey religious ideas.

**5. The Disclaimer Signs Underscored the Symbolic Religious Message.**

The court of appeals held that an appropriate disclaimer could somewhat mitigate the religious significance of the displays. Even if true, it does not aid petitioners here. Each of the symbols was accompanied by a sign which made no effort to dispel any suggestion of government endorsement.

On the contrary, the signs reinforce the impression of government endorsement of each symbol's religious message. The sign accompanying the Creche simply announced that the Creche was donated to the County by the Holy Name Society. (JA 290-91). Far from disclaiming state endorsement, that sign proclaims the Creche to be a project of government. Similarly, the sign accompanying the Menorah describes it as the City's display.[38] Unlike the sign at issue in *McCreary v. Stone*, *supra*,[39] these signs proudly proclaim government involvement.[40] They, consistent with every other element of the displays, bespeak an official endorsement of religion.

In summary, the five factors considered by the court of appeals here, in addition to the holiday context of the displays, assist the court's determination whether a particular display of a religious symbol, when considered in its full context, has the direct and immediate effect of advancing religion in violation of the Establishment Clause. This was the contention of respondents below and the panoply of factors enabled the Third Circuit properly to assess that contention. This Court should endorse that analysis because it will enable other courts, when similarly

38. That sign read: "Salute to Liberty. During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." (JEV 41).

39. "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization." 739 F.2d at 720.

40. *Compare* the disclaimer in *American Jewish Congress v. City of Chicago*, *supra*, which stated "[T]his exhibit is neither sponsored nor endorsed by the Government of the City of Chicago." 827 F.2d at 120.

presented with governmental displays of religious symbols, to assess their constitutionality.

## IV. THE JUXTAPOSITION OF THE CHRISTMAS TREE AND MENORAH DOES NOT UNDERCUT THE CONCLUSION THAT THE DISPLAY OF THE MENORAH ON THE STEPS OF PITTSBURGH'S CITY-COUNTY BUILDING VIOLATES THE ESTABLISHMENT CLAUSE.

*Lynch*'s holding was premised on its finding that the holiday display in Pawtucket marked a secular celebration of a public holiday. This Court recognized that in one form or another, Christmas is celebrated everywhere, even on government property, typically in the form of a Christmas tree. In this case, Chabad begins with that assumption and advocates an argument which displays a shocking insensitivity for those Americans, like respondent Tunador, who are neither Jews nor Christians; namely, that government must erect Menorahs next to an "official" Christmas tree to counterbalance the overwhelmingly Christian message delivered by municipal displays that feature Christmas trees. (Chabad Brief at 16-17). The presence of the tree, however, does not alter the conclusion that the display of the Menorah on the steps of Pittsburgh's City-County Building cannot withstand constitutional scrutiny.

While amici do not wish to be understood as condoning the practice of placing Christmas trees on public land,[41] they acknowledge that, in analyzing seasonal displays under the Establishment Clause, courts will conclude that the tree has become a secular symbol of a secular holiday, devoid of any religious connotation. However, the Menorah in this culture is primarily viewed as a Jewish religious symbol, not the equivalent of a Christmas tree. The juxtaposition of these two symbols does not defeat the religious impact of the Menorah.

In a "nation with the soul of a church,"[42] in which religion

41. On the contrary, amici believe that, as a matter of public policy, the practice is insensitive to non-Christians.

42. *See* S.E. Mead, *The Nation With The Soul of A Church* (1975).



is so much a part of the national culture, it is not surprising that the Establishment Clause would have substantial impact. Disentangling government and religion sometimes impacts on the surrounding culture, hurrying its secularization, though the culture is not itself subject to the Establishment Clause. However, where the culture has religious elements, government must, by virtue of the Establishment Clause, stand free of it.

Over time, some practices, religious in origin, lose their religious significance or become so integrated into the secular culture that their religious significance is obscured, or even lost. Such was the case with the Sunday blue laws. *Gallagher v. Crown Kosher Market*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961) (collectively *Sunday Blue Law Cases*).

Without doubt, Christmas has become part of the popular culture and has lost much of its religious significance. *Lynch*, 465 U.S. at 680; J.H. Barnett, *The American Christmas: A Study in National Culture* (1954). But not *every* Christmas practice is part of the popular culture. Many are still the exclusive province of the churches. Even under the Solicitor General's seemingly limitless approval of governmental acknowledgments of the role of religion in American life (U.S. Brief at 21), it cannot seriously be contended that a municipality may sponsor a Christmas Mass. And judges, including at least one who believes that *Lynch* permits the December display of Creches in all circumstances, have had little difficulty concluding that *Lynch* does not permit the display of Crosses at Christmas to mark the holiday.[43]

The task in a case involving publicly sponsored holiday practices is to determine which religious symbols have entered the secular culture to such a degree as to be permissible for government use. In the case of non-Christian religious practices, this task is greatly eased, for such practices are unlikely to have entered the general culture. The task is harder in the case of

43. *See ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986); *ACLU v. Mississippi State General Services Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987); *Libin v. Town of Greenwich*, 625 F. Supp. 393 (D. Conn. 1985).

Christian practices, where only case-by-case adjudication can distinguish between secularized religious practices and still sacred ones.

As occurred in the *Sunday Blue Law Cases*, *supra*, this method of inquiry is likely to tolerate practices which are popularly regarded as devoid of substantial current religious content, but which are still seen as deeply religious by minority faiths.[44] This is the case with the Christmas tree. With the exception of the unusual situation in which a tree is decorated or displayed in a fashion to suggest only a religious message, it may be placed on public land without violating the Establishment Clause. *Lynch v. Donnelly*. Unlike the Creche, whose origin is purely religious, the Christmas tree's origins lie in an ancient winter solstice festival, with little or no contemporary religious significance. Over the centuries, Christian churches repeatedly tried unsuccessfully to give the tree a religious meaning. The tree came to America with German immigrants and without religious connotations; none have been added over the years. Indeed, the tree is today *the* American symbol of the secular Christmas.[45]

By contrast, in this culture, a Menorah as displayed by Chabad is primarily a Jewish religious symbol.[46] Hence, it is not the legal equivalent of a Christmas tree.[47] The equality principle of the First Amendment, like its counterpart in the Fourteenth,

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44. A minority may even recognize that a particular practice no longer has religious significance for the majority faith, but regard it as one which marks the boundary between the two faiths. Thus, Jews can, at the same time, acknowledge that a Christmas tree is not a religious symbol for Christians, but treat it as unacceptable for display in Jewish homes.

45. *See* J.W. Golby and A.W. Purdue, *The Making of Modern Christmas* 61 (1986); P.V. Snider, *The Christmas Tree Book* 11-35 (1961); C.A. Miles, *Christmas in Ritual and Tradition: Christian and Pagan* 263-71 (1912).

46. *See* H. Dreyfuss, *Symbol Sourcebook* 139 (1972) (Menorah is symbol of Judaism).

47. If Chabad is correct that the Christmas tree is a religious symbol, then the appropriate remedy is not one compounding the constitutional felony, as Chabad would have it, but an order banning all officially sponsored religious displays or at least those which do not comport with the requirements of *Lynch*.



requires only that like, not unlike, things be treated alike.[48] There are non-religious Chanukah symbols such as a dreidel (top) or a figure of Judah Maccabee, which would raise an equality claim. The Menorah does not.

Amici respectfully submit that to treat the Menorah as a secular cultural symbol that is neutral in meaning and devoid of any inherent religious meaning does an injustice to the Menorah. Government use of religious symbols degrades those symbols and in turn degrades religion.[49] *See Engel v. Vitale*, 370 U.S. 421, 431 (1962).

Two recent polls evidence the position that the majority of Jews and their spiritual leaders prefer to retain the Menorah's religious significance unencumbered by intimate (and necessarily secularizing) contact with the state.[50] The first one demonstrated that, notwithstanding the ubiquitousness of the government Christmas tree, some 65 percent of American Jews do not wish to see Menorahs placed on government land. The other showed that 80 percent of American rabbis share that view.

If this were an access to a public forum case, as was *Widmar v. Vincent*, 454 U.S. 263 (1981), these polls would be irrelevant, since even a majority of Jews may not properly use government to censor Chabad's access to a public forum. But since this is not a public forum case, as Chabad concedes (Chabad Brief at 30), neither may it use government to compel the rest of the Jewish community to accept its idiosyncratic view that the Menorah

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48. A Creche and a Menorah are, however, comparable, since both are religious symbols. Should the Court uphold the placement of the Creche at the City Hall, *Larson v. Valente*, 456 U.S. 228 (1982), might well require that a municipality display, or permit the display of, a Menorah alongside the Creche.

49. As stated by the National Council of Churches of Christ in the USA, government display of Nativity Creches "trivializes [these] holy symbols." Brief Amici Curiae of American Jewish Committee and the National Council of Churches of Christ in the USA at III. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

50. The first poll was commissioned by the American Jewish Committee and released in October 13, 1988. The second was commissioned by the Williamsburg Charter Foundation and released in February 1988. Copies of both polls are on file with the Clerk of this Court.

must be placed on public land to counter the alleged baleful effects of the Christmas tree.

Chabad's argument is premised on the assumption that the display of the tree, without the Menorah, would be unfair to Jews. There is no general constitutional requirement, however, that a state speaking on one side of a controversial issue provide "equal time" for those taking an opposing point of view.[51] Although the City of Richmond, Virginia, may memorialize Confederate generals on one of its main thoroughfares, neither Nat Turner's nor John Brown's descendants have a constitutional right to place alongside those monuments one commemorating their respective ancestors in order to counter the symbolic impact of the publicly sponsored memorials.

The Establishment Clause does not guarantee that minority groups will feel perfectly at ease in the secular culture. Even if, for example, the government were to erect no Christmas trees, the very fact that government offices are closed on Christmas would signal to Jews that they are different.

The Establishment Clause is not alone sufficient to solve the problems confronting religious minorities. It is no substitute for the responsibility of religious groups to insure that their adherents are sufficiently educated, sufficiently strengthened, and sufficiently self-confident to withstand the siren song of the surrounding culture. They are charged with the difficult task of presenting their particularity at the same time as they participate in the larger society. Indeed, it is particularly important for religious minorities that their sacred symbols be retained as such, and not used by the culture for profane purposes, no matter how well intended.

The Menorah as displayed at Pittsburgh City Hall, like the Creche displayed at the Allegheny Courthouse, is a religious symbol. Both displays at seats of government, when considered in their full context, have the direct and immediate effect of advancing religion in violation of the Establishment Clause.

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51. *Serra v. United States General Services Admin.*, 847 F.2d 1045 (2nd Cir. 1988); *Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986) (Scalia, J.); M. Yudoff, *When Government Speaks* 292-99 (1983).



## Conclusion

For the reasons stated, the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

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# APPENDIX

## APPENDIX

### Member Organizations Of The National Jewish Community Relations Advisory Council

Birmingham Jewish Community Council
Greater Phoenix Jewish Federation
Tucson Jewish Federation of Southern Arizona
Greater Long Beach & West Orange County Jewish Community Federation
Los Angeles Community Relations Committee of Jewish Federation-Council
Oakland Greater East Bay Jewish Community Relations Council
Orange County Jewish Federation
Sacramento Jewish Community Relations Council
San Diego Community Relations Committee of United Jewish Federation
San Francisco Jewish Community Relations Council
Greater San Jose Jewish Community Relations Council
Greater Bridgeport Jewish Federation
Greater Danbury Community Relations Council Jewish Committee of Jewish Federation
Eastern Connecticut Jewish Federation
Greater Hartford Community Relations Committee of Jewish Federation
New Haven Jewish Federation
Greater Norwalk Jewish Federation
Stamford United Jewish Federation
Waterbury Jewish Federation
Jewish Community Relations Council of Connecticut
Wilmington Jewish Federation of Delaware
Greater Washington Jewish Community Council
South Broward Jewish Federation
Jacksonville Jewish Federation
Greater Miami Jewish Federation
Greater Orlando Jewish Federation
Palm Beach County Jewish Federation
Pinellas County Jewish Federation

Sarasota Manatee Jewish Federation
South County Jewish Federation
Atlanta Jewish Federation
Savannah Jewish Council
Metropolitan Chicago Jewish Community Relations Council of the Jewish United Fund
Peoria Jewish Federation
Springfield Jewish Federation
Indianapolis Jewish Community Relations Council
South Bend Jewish Federation of St. Joseph Valley
Jewish Community Relations Council of Indiana
Greater Des Moines Jewish Federation
Lexington Central Kentucky Jewish Federation
Louisville Jewish Community Federation
Greater New Orleans Jewish Federation
Shreveport Jewish Federation
Portland Southern Maine Jewish Federation—Community Council
Baltimore Jewish Community Relations Council
Greater Boston Jewish Community Relations Council
Marblehead North Shore Jewish Federation
Greater New Bedford Jewish Federation
Springfield Jewish Federation
Worcester Jewish Federation
Metropolitan Detroit Jewish Community Council
Flint Jewish Federation
Minneapolis Minnesota & Dakotas Jewish Community Relations Council—Anti-Defamation League
Greater Kansas City Jewish Community Relations Bureau
St. Louis Jewish Community Relations Council
Omaha Jewish Community Relations Committee of Jewish Federation
Atlantic County Federation of Jewish Agencies
Central New Jersey Jewish Federation
Delaware Valley Jewish Federation
Metrowest United Jewish Federation
Greater Middlesex County Jewish Federation



Northern New Jersey Jewish Community Relations Council
Southern New Jersey Jewish Community Relations Council of Jewish Federation
Albuquerque Jewish Community Council
Binghamton Jewish Federation of Broome County
Greater Buffalo Jewish Federation
Elmire Community Relations Committee of Jewish Welfare Fund
Greater Kingston Jewish Federation
Northeastern New York United Jewish Federation
Rochester Jewish Federation
Syracuse Jewish Federation
Utica Jewish Federation
Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati Jewish Community Relations Council
Cleveland Jewish Community Federation
Columbus Community Relations Committee of Jewish Federation
Greater Dayton Community Relations Council of Jewish Federation
Greater Toledo Community Relations Council of Jewish Federation
Youngstown Jewish Community Relations Council of Jewish Federation
Oklahoma City Jewish Community Council
Tulsa Jewish Federation
Portland Jewish Federation
Allentown Community Relations Committee of Jewish Federation
Erie Jewish Community Council
Greater Philadelphia Jewish Community Relations Council
Pittsburgh Community Relations Committee of United Jewish Federation
Scranton-Lackawanna Jewish Federation
Greater Wilkes Barre Jewish Federation

Providence Community Relations Council of Rhode Island Jewish Federation
Charleston Jewish Community Relations Committee
Columbia Community Relations Committee of Jewish Welfare Federation
Memphis Jewish Community Relations Council
Nashville & Middle Tennessee Jewish Federation
Austin Jewish Community Council
Greater Dallas Jewish Community Relations Council of Jewish Federation
El Paso Jewish Community Relations Committee
Fort Worth Jewish Federation
Greater Houston Jewish Federation
San Antonio Jewish Community Relations Council of Jewish Federation
Newport News — Hampton United Jewish Community Relations
Council of Jewish Federation
Richmond Jewish Community Federation
Tidewater United Jewish Federation
Greater Seattle Jewish Federation Madison Jewish Community Council
Milwaukee Jewish Council